

**MAR 20 2006**

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**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

THOMAS E. BREWSTER,

Petitioner - Appellee,

v.

RODERICK Q. HICKMAN,\*  
Secretary of the California Department of  
Corrections and Rehabilitation,

Respondent - Appellant.

No. 05-15701

D.C. No. CV-03-02265-MCE

MEMORANDUM\*\*

Appeal from the United States District Court  
for the Eastern District of California  
Morrison C. England, Jr., District Judge, Presiding

Argued and Submitted March 14, 2006  
San Francisco, California

Before: RYMER, W. FLETCHER, and CLIFTON, Circuit Judges.

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\* At the request of the California Attorney General's office, Roderick Q. Hickman, who currently serves as the Secretary of the California Department of Corrections and Rehabilitation, has been substituted as respondent.

\*\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The State of California appeals the district court's grant of an unconditional writ of habeas corpus to Thomas E. Brewster. Brewster claims that he suffered ineffective assistance of counsel on direct appeal before the California Court of Appeal. Though the parties agree that Brewster's appellate counsel's performance was deficient on direct review, Brewster has not shown a reasonable probability that the California Court of Appeal would have reversed the trial court's denial of his suppression motion but for his counsel's filing of a *Wende* brief. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). He thus failed to establish that he was prejudiced by his counsel's performance. *See id.* at 286-87. Accordingly, we conclude that the district court erred in granting the habeas petition.

REVERSED.